INDEX OF APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1614

LYNN Z. SMITH,
Appellant

v.

ANDREA DOBIN, Esq.; ELI HALTOVSKY; FIVE STAR SERVICES LLC; HONORABLE ANNE E. THOMPSON; HONORABLE MICHAEL B. KAPLAN; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JOHN DOE 5; JOHN DOE 6; JOHN DOE 7; JOHN DOE 8; JOHN DOE 9; JOHN DOE 10

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-18-cv-17515)
District Judge: Honorable Esther Salas

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

DLD-116 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1614

LYNN Z. SMITH,
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v.

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 1-18-cv-17515)
District Judge: Honorable Esther Salas

Submitted for Possible Dismissal Due to a Jurisdictional Defect or
Possible Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
March 11, 2021
Before: JORDAN, KRAUSE, and PHIPPS, Circuit Judges

(Opinion filed March 23, 2021)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Lynn Z. Smith appeals from the order of the District Court dismissing her complaint. We will affirm.

I.

Smith is the debtor in an ongoing Chapter 7 bankruptcy proceeding during which the Bankruptcy Judge authorized the sale of her house pursuant to a judgment of foreclosure. The sale was consummated on November 1, 2018. Smith's unsuccessful efforts to avoid the sale—which did not include an available appeal of the Bankruptcy Court's order authorizing it—are described in In re Smith, 757 F. App'x 77 (3d Cir. 2018) (affirming Bankruptcy Court order converting Smith's bankruptcy proceeding from Chapter 13 to Chapter 7). Smith also has filed with the District Court at least six other bankruptcy appeals and three civil actions implicating her bankruptcies.

This appeal concerns one of those civil actions. In this case, which Smith filed 11 days after our decision in In re Smith, Smith filed a complaint pro se alleging in wholly conclusory fashion that the sale of her house resulted from a "fraudulent bid-rigging scheme." As defendants, Smith named her Chapter 7 Trustee, the Bankruptcy Judge, a District Judge who presided over her bankruptcy appeals and one of her related civil actions, the individual who purchased her former house at the bankruptcy auction (Eli Haltovsky), and a company allegedly hired by Haltovsky to perform "demolition" work on the property (Five Star Services LLC). For relief, Smith requested the return of her

former house in its original condition as well as millions of dollars in damages.

The District Court, acting on motions to dismiss filed by three of the four categories of defendants, dismissed Smith's complaint as follows. First, the District Court dismissed Smith's claims against the Trustee pursuant to the Barton doctrine because Smith did not obtain the Bankruptcy Court's permission before seeking resolution of those claims in a different court. See In re VistaCare Grp., LLC, 678 F.3d 218, 224-28 (3d Cir. 2012) (discussing Barton v. Barbour, 104 U.S. 126 (1881)). Second, the District Court held that Smith's claims against Haltovsky are barred by claim preclusion because the Bankruptcy Court, in its sale-authorization order, already has adjudicated Haltovsky a good-faith purchaser for purposes of 11 U.S.C. § 363(m). Third, the District Court dismissed Smith's claims against the judicial defendants and Five Star without prejudice for inadequate service of process. The District Court also noted that Smith's complaint suffered from other deficiencies, including its failure to state any plausible claim to relief and the fact that her claims against the judicial defendants likely are barred by judicial immunity. Smith appeals.

II.

In addition to filing this appeal, Smith also filed a motion for reconsideration with the District Court. The District Court docketed that motion about a month and a half after Smith filed this appeal and about three months after its order of dismissal. As docketed, Smith's motion for reconsideration did not suspend this appeal under Fed. R.

App. P. 4(a)(4). The District Court later denied that motion on October 14, 2020. Smith claims that the District Court committed "fraud" by failing to docket the motion sooner, but we lack jurisdiction to review the District Court's handling of that motion because Smith did not file another notice of appeal after the District Court denied the motion and her time to do so has expired.[1] Thus, the only order before us for review is the District Court's order of dismissal. We have jurisdiction over that order under 28 U.S.C. § 1291.[2]

III.

We will affirm. Smith has filed over 20 documents in support of this appeal, including two responses and a letter purporting to supplement the record after we advised her that we would consider taking summary action. Smith, however, has not

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[1] Smith has raised complaints about the District Court's handling of her motion for reconsideration in documents that she filed with this Court both before and after the District Court denied the motion. The documents that she filed before the District Court's ruling cannot serve as notice of appeal from that ruling. See Marshall v. Comm'r Pa. Dep't of Corr., 840 F.3d 92, 94-95 (3d Cir. 2016) (per curiam). In the documents that she filed after the District Court's ruling, Smith does not indicate any intent to appeal (which she knows how to do) and instead asserts merely that the District Court's alleged fraud constitutes a ground to add the District Judge as a defendant. Thus, we decline to construe any of these documents as a notice of appeal. And because Smith could have filed a notice of appeal from the denial of reconsideration but did not, we also decline to treat any of her filings as a petition for a writ of mandamus. See Gillette v. Prosper, 858 F.3d 833, 841 (3d Cir. 2017) (noting that "mandamus must not be used as a mere substitute for appeal") (quotation marks omitted).

[2] Although the District Court dismissed certain of Smith's claims without prejudice for insufficient service of process, the District Court did not permit Smith to cure that defect and instead twice directed its Clerk to close the case. Thus, the District Court's order is final for purposes of § 1291 because the District Court dismissed the entire action and the case is over as far as the District Court is concerned. Cf. Doe v. Hesketh, 828 F.3d 159,

meaningfully challenged the District Court's order of dismissal. Indeed, Smith has not even mentioned the grounds on which the District Court dismissed her complaint, let alone raised anything suggesting that those grounds present a substantial question.

Nevertheless, we will affirm the District Court's order of dismissal on the following grounds. First, we will affirm the District Court's ruling that it lacked subject-matter jurisdiction over Smith's claims against the Trustee under the Barton doctrine. See In re VistaCare Grp., 678 F.3d at 224-28. We add, as did the District Court, that Smith was well aware of the Barton doctrine because the District Court previously applied it in dismissing Smith's claims against the Trustee in one of her other bankruptcy-related actions. (D.N.J. Civ. No. 1-18-cv-11483, ECF No. 15.) Smith did not appeal that ruling.

Second, we will affirm the District Court's ruling that Smith's claims against Haltovsky are barred by claim preclusion, and we conclude that Smith also failed to state a claim on which relief can be granted. Smith unsuccessfully challenged Haltovsky's purchase of her former house in the Bankruptcy Court, which adjudicated Haltovsky a good-faith purchaser for purposes of 11 U.S.C. § 363(m). Smith either litigated or could have litigated her allegations of fraud regarding Haltovsky in that proceeding. See In re Pursuit Capital Mgmt., LLC, 874 F.3d 124, 135-36 (3d Cir. 2017) (explaining that "good faith" for purposes of § 363(m) requires, inter alia, the absence of fraud or collusion);

165-66 (3d Cir. 2016).

CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 194-95 (3d Cir. 1999) (describing claim-preclusive effect of Bankruptcy Court orders).[3] To be sure, Smith's allegations of fraud against Haltovsky (like those against the other defendants) are wholly conclusory. Thus, to the extent that Smith's allegations may be too deficient to permit a determination whether she litigated or could have litigated them in her bankruptcy, those allegations fail to state a plausible claim to relief, see Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and amendment of her complaint is not warranted.[4]

Third, we will affirm the dismissal of Smith's claims against the judicial defendants on the ground that those claims are barred by judicial immunity. Smith alleges that the judicial defendants, through their rulings, either sanctioned or failed to

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[3] Among Smith's few factual allegations (which she asserts in several of her filings but not her actual complaint) is the allegation that Haltovsky told her husband in August 2017 that "I am the only person who can buy your property." If that alleged statement called into question the validity of the sale to Haltovsky as Smith claims, then she could have raised it in the Bankruptcy Court before that court approved the sale almost a year later on July 25, 2018.

[4] Smith has had adequate notice and opportunity to address this issue. Haltovsky argued in the alternative below, and the District Court suggested, that Smith failed to state a plausible claim to relief. Smith filed at least two responses on that issue in which she insisted that Haltovsky already had adequate notice of her claims. (E.g., ECF No. 19 at 11-12.). Smith also has filed numerous documents in support of her claims in both the District Court and this Court, all of which we have reviewed, some of which promise to provide an amended complaint or evidence that never proves forthcoming, and none of which suggests that Smith has any plausible claim against Haltovsky, let alone any claim that she could not have raised in the Bankruptcy Court. Thus, to the extent that Smith may have attempted to assert a claim against Haltovsky that would not have been barred by claim preclusion, we conclude both that she failed to state a claim and that amendment would be futile.

correct the other parties' alleged fraud. It is apparent that Smith bases this claim solely on the judicial defendants' judicial rulings, which were not made "in the clear absence of all jurisdiction." Capogrosso v. N.J. Sup. Ct., 588 F.3d 180, 184 (3d Cir. 2009) (per curiam) (quotation marks omitted). Indeed, Smith alleged in her complaint that the judicial defendants' alleged misconduct "can be proved entirely from the court records." (ECF No. 1 at 7 ¶ 14.) Thus, her claims against the judicial defendants fall squarely within the bounds of judicial immunity. See Capogrosso, 588 F.3d at 184.

Finally, we will affirm the dismissal of Smith's claims against Five Star on the ground that she failed to state a plausible claim to relief. Smith's claims against Five Star are derivative of her claims against Haltovsky because she alleges only that Five Star, working with Haltovsky, performed work on and removed property from her former house, which Haltovsky bought at auction. Smith has not stated any claim against Haltovsky as explained above, so she has not stated and has no basis for a claim against Five Star either.

III.

For these reasons, we will affirm the judgment of the District Court. Smith's motions are denied.

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LYNN Z. SMITH, **Plaintiff,** **v.** **ANDREA DOBIN, *et al.*,** **Defendants.**	**Civil Action No. 18-17515 (ES) (CLW)** **ORDER**

SALAS, DISTRICT JUDGE

Before the Court are three motions to dismiss *pro se* plaintiff Lynn Z. Smith's ("Plaintiff") Complaint (D.E. No. 1) from defendants Andrea Dobin ("Trustee"), Eli Haltovsky ("Haltovsky"), and the Honorable Michael B. Kaplan and the Honorable Anne E. Thompson ("Judge Defendants") (collectively, "Defendants"). (D.E. Nos. 11, 12 & 27). Additionally, the Trustee requests an injunction that would require Plaintiff to seek court approval before filing additional complaints against her. (D.E. No. 11-1 at 13–14). Also before the Court is Plaintiff's motion for default judgment against the Judge Defendants. (D.E. No. 26). Having considered the parties' submissions, the Court decided the motions without oral argument; *see* Fed. R. Civ. P. 78(b); and for the reasons stated in the Court's accompanying Opinion;

IT IS on this 14th day of February 2020,

ORDERED that the Defendants' motions to dismiss (D.E. Nos. 11, 12 & 27) are GRANTED; and it is further

ORDERED that the Trustee's motion for an injunction is DENIED (D.E. No. 11); and it is further

ORDERED that the Plaintiff's motion for default judgment (D.E. No. 26) is DENIED *without prejudice*; and it is further

ORDERED that all claims Plaintiff raises against Haltovsky are DISMISSED *with prejudice*; and it is further

ORDERED that all claims Plaintiff raises against the Trustee, Judge Defendants and Five Star Services LLC are DISMISSED *without prejudice*; and it is further

ORDERED that the Clerk of Court TERMINATE Docket Entry Numbers 11, 12, 26 and 27 and CLOSE THIS CASE.

s/Esther Salas
Esther Salas, U.S.D.J.

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LYNN Z. SMITH, **Plaintiff,** **v.** **ANDREA DOBIN, *et al.*,** **Defendants.**	**Civil Action No. 18-17515 (ES) (CLW)** **OPINION**

SALAS, DISTRICT JUDGE

Before the Court are three motions to dismiss *pro se* plaintiff Lynn Z. Smith's ("Plaintiff") Complaint (D.E. No. 1 ("Complaint" or "Compl.") from defendants Andrea Dobin ("Trustee"), Eli Haltovsky ("Haltovsky"), and the Honorable Michael B. Kaplan and the Honorable Anne E. Thompson ("Judge Defendants") (collectively, "Defendants"). (D.E. Nos. 11, 12, and 27). In addition, the Trustee requests an injunction that would require Plaintiff to seek court approval before filing additional complaints against her. (D.E. No. 11-1 at 13–14). Also before the Court is Plaintiff's motion for default judgment against the Judge Defendants. (D.E. No. 26). Plaintiff filed oppositions to the Trustee and Haltovsky's motions to dismiss on September 3, 2019. (D.E. Nos. 17 and 18). Plaintiff also filed an opposition to the Judge Defendants' motion to dismiss on December 20, 2019, the same day the Court granted a second extension for Plaintiff to respond until January 31, 2020. (D.E. Nos. 32 and 36). Plaintiff filed an additional response on January 31, 2020, which, like her various filings, reflects a twelve-page ramble that blames others for Plaintiff's failure to comport with the Federal Rules. (*See* D.E. No. 39). Accordingly, the Court has considered the parties' submissions and decides the motions without oral argument. *See* Fed.

R. Civ. P. 78(b); *see also* D.N.J. Civ. R. 78.1(b). For the following reasons, the Defendants' motions, except the Trustee's motion to enjoin, are GRANTED and Plaintiff's motion is DENIED.

I. Background

Plaintiff's complaint can be characterized as a mishmash of conclusory allegations regarding a "fraudulent bid-ridding scheme" that was apparently carried out in the U.S. Bankruptcy Court and the U.S. District Court, as well as by those involved in the administration of Plaintiff's bankruptcy estate. (*See generally*, Compl.).[1] For example, Andrea Dobin acted as the trustee of Plaintiff's bankruptcy estate and allegedly engaged in misconduct in carrying out her responsibilities. (*Id.* at 3 ¶ 5). Eli Haltovsky purchased real property previously owned by Plaintiff (the "Subject Property"), and as best as this Court can decipher, Plaintiff attempts to challenge the validity of Haltovsky's purchase of the Subject Property. (*See, e.g.*, Compl. at 3, ¶ 5–6; D.E. No. 12-1 at 2). The Honorable Michael B. Kaplan and the Honorable Anne E. Thompson were judicial officers in Plaintiff's bankruptcy proceeding and her appeal to the U.S. District Court, and were allegedly engaged in non-authorized acts that are unspecified. (*See generally* Compl.; *id.* at 4 ¶ 11; D.E. No. 27-1 at 3). Additionally, the Complaint is logged against Five Star Services LLC, a "demolition company" that is allegedly connected to Haltovsky, which Plaintiff seeks to hold liable for removing personal property from and any damage to the Subject Property. (Compl. at 4 ¶ 7). Plaintiff rambles a garden-variety of generalized grievances in connection with the auction of her home, including, but not limited to, failure to investigate violations of unspecified state and federal law by public officials and offices, and aiding and abetting a fraudulent scheme. (*See generally id.*).

[1] The Court cites to page numbers and paragraph numbers in the Complaint because Plaintiff failed to list paragraphs consecutively. Consequently, the Complaint contains duplicative paragraph numbers.

II. Legal Standard

A. Lack of Subject-Matter Jurisdiction

The Court can adjudicate a dispute only if it has subject-matter jurisdiction to hear the asserted claims. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (noting that federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto"). "Rule 12(b)(1) governs jurisdictional challenges to a complaint." *Otto v. Wells Fargo Bank, N.A.*, No. 15-8240, 2016 WL 8677313, at *2 (D.N.J. July 15, 2016), *aff'd*, 693 F. App'x. 161 (3d Cir. 2017). "'A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1) because standing is a jurisdictional matter.'" *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (quoting *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)).

In deciding a 12(b)(1) motion, "a court must first determine whether the party presents a facial or factual attack because the distinction determines how the pleading is reviewed." *Leadbeater v. JPMorgan Chase, N.A.*, No. 16-7655, 2017 WL 4790384, at *3 (D.N.J. Oct. 24, 2017). "When a party moves to dismiss prior to answering the complaint, as is the case here, the motion is generally considered a facial attack," which "contests the sufficiency of the complaint because of a defect on its face." *Id.* (internal quotation marks omitted). In reviewing a facial attack, the court should consider only the allegations in the complaint, along with documents referenced therein, in the light most favorable to the nonmoving party. *See Constitution Party of Pa.*, 757 F.3d at 358. Thus, the motion is handled much like a 12(b)(6) motion, and allegations in the complaint should be accepted as true. *Leadbeater*, 2017 WL 4790384, at *3.

B. Failure to State a Claim

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In assessing a Federal Rule of Civil Procedure 12(b)(6) motion, "'all allegations in the complaint must be accepted as true, and the plaintiff must be given the benefit of every favorable inference drawn therefrom.'" *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (quoting *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992)). But a reviewing court does not accept as true the complaint's "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *See Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions."). "In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of the public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir.2010). Further, "[a] document filed *pro se* is to be liberally construed . . . [and] a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2008) (citations and internal quotation marks omitted).

Finally, "if a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 245 (3d Cir.2008) (citing *Alston v. Parker*, 363 F.3d 299, 235 (3d Cir. 2004)); *see also Ray v. First Nat'l Bank of Omaha*, 413 F. App'x 427, 430 (3d Cir. 2011) ("A

district court should not dismiss a pro se complaint without allowing the plaintiff an opportunity to amend his complaint unless an amendment would be inequitable or futile.").

III. Discussion

A. The Trustee

i. Motion to Dismiss

The Trustee argues that the Court lacks subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiff failed to seek leave from the Bankruptcy Court prior to filing the instant action. (D.E. No. 11-1 at 6–11). The Court agrees.

A party "must first obtain leave of the bankruptcy court before it brings an action in another forum against a bankruptcy trustee for acts done in the trustee's official capacity." *In Re VistaCare Group, LLC*, 678 F.3d 218, 224 (3d. Cir. 2012) (citing *Barton v. Barbour*, 104 U.S. 126 (1881)); *see also In re Lin*, No. 14-1373, 2015 WL 1736500, at *3 (D.N.J. Apr. 16, 2015), *aff'd*, 647 F. App'x 107 (3d Cir. 2016); *In re Day*, No. 08-18384, 2014 WL 4271647, at *3–4 (D.N.J. Aug. 28, 2014).

Moreover, it is apparent that the Plaintiff was ***well aware*** of the requirement to seek leave in her bankruptcy proceeding. On December 19, 2018—merely nine days before filing the instant Complaint—Judge Kugler issued an Order in a similar case also initiated by the same Plaintiff, where she alleged that the Trustee engaged in misconduct surrounding the same factual circumstances presently at issue: Plaintiff's bankruptcy proceeding and the foreclosure and sale of her home. *See Smith v. Rabner*, No. 18-11483, at D.E. No. 15 (D.N.J. Dec. 19, 2018) (dismissing Plaintiff's complaint against the Trustee for lack of subject matter jurisdiction because she failed to seek leave from the Bankruptcy Court). Additionally, as Judge Kugler noted, Plaintiff's prior attempts to vacate the Bankruptcy Court's judgments based upon similar claims

against the Trustee have been dismissed by the Third Circuit. *See In re Lynn Z. Smith*, No. 18-3000, 2018 WL 6617891, at *3 (3d. Cir. Dec. 17, 2018) (rejecting Plaintiff's attempt to relitigate her prior bankruptcy proceeding premised on misconduct in the foreclosure proceeding and her personal bias against the Trustee). The Third Circuit also rejected the argument that the Trustee engaged in the alleged misconduct. *Id.* at n. 8.

Accordingly, the Court concludes that it lacks subject matter jurisdiction over purported claims against the Trustee because Plaintiff did not obtain leave from the Bankruptcy Court before filing this action. *See Soni v. Holtzer*, 2007 WL 1521486, at *4 (D.N.J. May 23, 2007) ("[T]his Court lacks subject matter jurisdiction over Plaintiff's claims . . . because Plaintiff failed to obtain leave from the bankruptcy court where her proceedings took place . . ."), *aff'd*, 255 F. App'x 614 (3d Cir. 2007). Thus, Plaintiff's purported claims against the Trustee are dismissed *without prejudice*.[2]

ii. Motion for an Injunction

The Trustee also moves for an injunction that prevents Plaintiff from filing additional complaints against the Trustee without the Court's permission. (D.E. No. 11-1 at 13–14). Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), district courts may issue an injunction "on litigants who have engaged in abusive, groundless, and vexatious litigation." *Yoder v. Wells Fargo Bank, N.A.*, 765 F. App'x 822, 824 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 253 (2019). In the context of *pro se* plaintiffs, an injunction of this sort must be considered with caution. *See id.*

[2] It also bears noting that the Third Circuit has already appeared to address Plaintiff's allegations that the Trustee engaged in misconduct, and summarily found those allegations to be baseless. *In re Lynn Z. Smith*, No. 18-3000, 2018 WL 6617891, at *3 (3d. Cir. Dec. 17, 2018). Thus, the Court warns Plaintiff that continuous and vexatious filings based on the same allegations may subject to her sanctions, such as a prefiling injunction, *see infra* section III.A.ii.

To impose an injunction, district courts must comply with three requirements. First, an injunction "should be entered only in exigent circumstances, such as when a litigant ***continuously abuses*** the judicial process by filing meritless and repetitive actions." *Id.* (citing *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir. 1993) (emphasis added). Second, the court must put the litigant on notice and allow her "to show cause why the proposed injunction should not issue." *Id.* Lastly, the injunction "must be narrowly tailored to fit the particular circumstances of the case." *Id.*

Because this Court has not provided Plaintiff with an opportunity to show cause as to why the Trustee's proposed injunction should be denied, it declines to further evaluate the Trustee's request. However, as discussed throughout this Opinion, the Court notes that Plaintiff previously commenced a similar action that contained the same general allegations against many of the same parties, namely, the Trustee and Judge Defendants, which was dismissed. Additionally, Plaintiff has filed a number of appeals and filings on appeal throughout the course of her bankruptcy proceedings that have been denied. *See generally, In re Smith*, 757 F. App'x 77. Should Plaintiff file another action premised on alleged misconduct throughout her bankruptcy proceedings and the administration of her bankruptcy estate, the Court will instruct Plaintiff to show good cause as to why she should not be enjoined from filing similar lawsuits. At that point, the Court will consider whether Plaintiff is "continually abusing the judicial process" such that a narrowly tailored pre-filing injunction is necessary. *Grossberger v. Ruane*, 535 F. App'x 84, 86 (3d Cir. 2013).

B. Haltovsky

As best this Court can decipher, Plaintiff generally attempts to challenge the validity of the Haltovsky's involvement and purchase of the Subject Property. (*See generally* Compl.). Haltovsky argues that Plaintiff cannot challenge his purchase of the Subject Property under the

principle of res judicata because the Bankruptcy Court found that he was a good-faith purchaser under 11 U.S.C. § 363(m). (D.E. No. 12-1 at 3). The Court agrees.

Under the doctrine of claim preclusion, a lawsuit is barred where there has been: "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." *Abdullah v. Small Bus. Banking Dep't of Bank of Am.*, 628 F. App'x 83, 84 (3d Cir. 2016) (quoting *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir.1991)).

Moreover, "[t]he Third Circuit has applied the claim preclusion doctrine in the context of bankruptcy proceedings." *I.R.S. v. Patriot Contracting Corp.*, No. 06-2133, 2007 WL 433392, at *8 (D.N.J. Feb. 7, 2007) (collecting cases); *see also In re Target Indus., Inc.*, 328 B.R. 99, 115 (Bankr. D.N.J. 2005) ("[R]es judicata is applicable to final orders issued by the bankruptcy court."). "Although the contours of a bankruptcy case make its application somewhat more difficult than in other contexts, the doctrine of res judicata is fully applicable to bankruptcy court decisions . . . . Moreover, res judicata is applicable to final orders issued by the bankruptcy court." *In re Target Indus., Inc.*, 328 B.R. at 115.

Here, Haltovsky argues that because the Bankruptcy Court issued an order dated July 25, 2018, authorizing the sale of Plaintiff's home at auction, she cannot re-adjudicate the validity of his purchase after the Bankruptcy Court's decision. (*See* D.E. No. 12-1 at 4; D.E. No. 12-2, Ex. D).[3] Significantly, the Bankruptcy Court found that Haltovsky was a good-faith purchaser under 11 U.S.C. § 363(m). (D.E. No. 12-1 at 4–5; D.E. No. 12-2, Ex. D at 3). Moreover, Haltovsky

[3] The Court takes judicial notice of several items of public record attached to Haltovsky's motion to dismiss from the underlying Bankruptcy Court proceeding that are integral to the procedural history and are incorporated by reference in the Complaint. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) ("In evaluating a motion to dismiss, we may consider documents that are attached to or submitted with the complaint, and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case.").

contends that Plaintiff's motion for reconsideration of the Bankruptcy Court's July 25, 2018 Order was denied and Plaintiff failed to appeal the authorization of sale to the District Court. (D.E. No. 12-1 at 4; D.E. No. 12-2, Exs. G and H).[4] Accordingly, the first and second elements of res judicata are satisfied because the Bankruptcy Court issued a final order in a prior action involving the same parties. *See, e.g.*, *Patriot Contracting Corp.*, 2007 WL 433392, at *8 ("The Court finds that the [Bankruptcy Court's] Order constitutes a final judgment for purposes of *res judicata*."); (*see* D.E. No. 12-2, Ex. E (order authorizing the sale of the Subject Property to Eli Haltovsky)).

Finally, as to the third element, the Third Circuit has stated that "[i]n deciding whether two suits are based on the same cause of action, we take a broad view, looking to whether there is an essential similarity of the underlying events giving rise to the various legal claims." *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 194 (3d Cir.1999) (citations and internal quotations omitted). Because the current action against Haltovsky concerns his purchase of the Subject Property, it relates to whether the Bankruptcy Court properly authorized the sale of such property to Haltovsky. Plaintiff may not use this Court as a vehicle to further contest the Bankruptcy Court's decision. Thus, element three is also met.

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[4] Additionally, Haltovsky relies on findings from the Third Circuit in *In Re Smith*, where Plaintiff appealed a separate action that she filed in connection with the same bankruptcy proceeding underlying this action. 757 Fed. App'x 77 (3d Cir. 2018). The Third Circuit recognized that:

> On May 24, 2018, the Bankruptcy Court entered an order authorizing the Chapter 7 Trustee to sell Smith's home at auction on July 17, 2018. Smith did not appeal that order to the District Court or ask the District Court to stay it, but she filed a motion to stay the auction in her previous appeal to this Court. This Court denied her stay motion on July 16. The auction proceeded and, on July 25, the Bankruptcy Court issued an order authorizing the Trustee to sell Smith's home to the winning bidder. In doing so, the Bankruptcy Court found that the buyer is a good-faith purchaser for value for purposes of 11 U.S.C. § 363(m) and is entitled to the protection thereof. Once again, Smith neither appealed the sale-authorization order to the District Court nor obtained a stay of that order. She renewed her request for a stay with this Court, but we denied it as moot. According to the Trustee, the sale of the home was consummated as of November 1, 2018.

Id. 757 Fed. App'x at 81 n.4.

Accordingly, the Court finds that the action against Haltovsky should be dismissed *with prejudice* under the doctrine of res judicata.[5] *See Phillips*, 515 F.3d at 245 ("[I]f a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile.").

C. Judge Defendants

i. Plaintiff's Motion for Default Judgment

First, the Court will address Plaintiff's motion for default judgment against the Judge Defendants. (D.E. No. 26).

Plaintiff requested an entry of default on the Judge Defendants on September 27, 2019. (D.E. No. 23). However, the Clerk of Court's quality control message dated October 1, 2019, clearly informed Plaintiff that her request for default could not be granted because she did not effectuate service under Federal Rule of Civil Procedure 4. Nonetheless, Plaintiff filed her motion for default judgment one month later, on November 1, 2019. (D.E. No. 26). In fact, Plaintiff admits in her motion that "[t]he clerk has yet to issue the Entry of Default." (*Id.* at 1).

To receive a judgment of default, a party must first seek the entry of default from the Clerk of Court. Fed. R. Civ. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk must enter the party's default."). Entry of default judgment is a two-step process; a default judgment may be entered only after the entry

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[5] Additionally, Haltovsky moves to dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 8(a) for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). (D.E. No. 12-1 at 7–10). Significantly, a complaint must set forth "a short and plain statement of the claim[s] showing that the [plaintiff] is entitled to relief" (Rule 8(a)(2)), with enough specificity as to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted).

Here, the Complaint, and Plaintiff's purported opposition to Haltovsky's motion to dismiss (*see* D.E. No. 19), may be fairly characterized as a repetitive rambling of all the apparent wrongs Plaintiff believes have been inflicted upon her by everyone involved in the administration of her bankruptcy estate. (*See generally* Compl.; *see also* D.E. Nos. 17 & 19). Moreover, the Complaint raises five total allegations that mention the Haltovsky specifically. (*See* Compl. at 3 ¶ 6, 4 ¶¶ 7 & 9, 6 ¶ 18 and 7 ¶ 19). Other than general allegations challenging the validity of Haltovsky's purchase of the Subject Property, which the Court dismisses *with prejudice*, it remains unclear if Plaintiff attempts to bring any additional purported claims against Haltovsky. (*See generally id.*).

of default by the Clerk of Court. *See Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club*, 175 F. App'x 519, 521, n.1 (3d Cir. 2006) ("Prior to obtaining a default judgment under either Rule 55(b)(1) or Rule 55(b)(2), there must be an entry of default as provided by Rule 55(a)."); *see also Limehouse v. Delaware*, 144 F. App'x 921, 923 (3d Cir. 2005).

Because the Clerk of Court has yet to file an entry of default, the Court may not entertain Plaintiff's motion for default judgment. Accordingly, Plaintiff's motion for default judgment is denied, *without prejudice*.

ii. Judge Defendants' Motion to Dismiss

Next, the Court will turn to the Judge Defendants' motion to dismiss the Complaint. (D.E. No. 27-1). The Judge Defendants argue that Plaintiff failed to properly effectuate service under Federal Rule of Civil Procedure 4(i), which requires service on the named defendants, as well as the United States attorney for the District of New Jersey, and the United States Attorney General in Washington, D.C. (*Id.* at 6–7).

Federal Rule of Civil Procedure 4(i)(2) provides that: "To serve a . . . United States officer or employee sued only in an official capacity, a party must serve the ***United States*** and also send a copy of the summons and complaint by registered or certified mail to the agency, corporation, officer or employee." (emphasis added). Moreover, to serve an officer or employee of the United States "in an individual capacity" for acts or omissions that occurred in connection with their official duties "performed on the United States' behalf . . . a party must also serve the ***United States***." Fed. R. Civ. P. 4(i)(3) (emphasis added).

To achieve service on the United States under Federal Rule of Civil Procedure 4(i)(1), a party must serve the summons and complaint to the United States attorney in the district where the action is commenced. Alternatively, a plaintiff may serve an assistant United States attorney, a

designated clerical employee, or the civil-process clerk at the United States attorney's office. Fed. R. Civ. P. 4(i)(1)(A). Additionally, a plaintiff must serve the Attorney General of the United States in Washington, D.C. Fed. R. Civ. P. 4(i)(1)(B); *Gish v. Attorney Gen. U.S.*, 604 F. App'x 119, 120 (3d Cir. 2015).

Consequently, whether suing the Judge Defendants in their official or individual capacities, Plaintiff was required to serve the United States attorney for the District of New Jersey as well as the United States Attorney General in Washington, D.C. Fed. R. Civ. P. 4(i). The docket reflects no attempt by Plaintiff to serve either government official in accordance with Federal Rule of Civil Procedure 4(i). Moreover, Plaintiff was on notice of her failure to comply with Rule 4 on October 10, 2019, when the Clerk of Court advised Plaintiff that her request for default judgment was denied because of insufficient service under Rule 4. Additionally, the Judge Defendants' moving brief similarly put Plaintiff on notice of Rule 4's requirements. (*See* D.E. No. 27-1). Accordingly, for the reasons stated above, Plaintiff's claims against the Judge defendants are dismissed *without prejudice* under Federal Rule of Civil Procedure 4(i).[6]

D. Five Star Services LLC

"It is well established that, even if a party does not make a formal motion to dismiss, the court may, sua sponte, dismiss the complaint where the inadequacy of the complaint is clear." *Michaels v. New Jersey*, 955 F. Supp. 315, 331 (D.N.J. 1996) (citing, among other cases, *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980)). "While sua sponte dismissal is not a standard practice, it 'is not error . . . provided that the complaint affords a sufficient basis for the court's actions.'" *Mikhaeil v. Santos*, No. 10-3876, 2014 WL 6747103, at *2 (D.N.J. Dec. 1, 2014), *aff'd*, 646 F. App'x 158 (3d Cir. 2016) (quoting *Bryson*, 621 F.2d at 559). Furthermore,

[6] In addition, although not directly raised in their motion (*see* D.E. No. 27-1), it appears that Plaintiff's purported claims against the Judge Defendants would be barred under the doctrine of judicial immunity.

"the Court may sua sponte consider whether it lacks jurisdiction over the defendants due to insufficient service of process." *Peters v. U.S. Dep't of Hous. & Urban Dev.*, No. 04-6057, 2006 WL 278916, at *2 (D.N.J. Feb. 1, 2006); *see also Greene v. Sloane*, 783 F. App'x 108, 109 (3d Cir. 2019).

The docket reflects that Plaintiff failed to properly serve Five Star Services LLC. A domestic or foreign corporation, partnership, or other unincorporated association, may be served under Federal Rule of Civil Procedure 4(h)(1) in the United States by either (i) "in the manner prescribed by Rule 4(e)(1) for serving an individual" or (ii) "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant." *Reddy v. MedQuist, Inc.*, No. 06-4410, 2009 WL 2413673, at *6 (D.N.J. Aug. 4, 2009).

Under Federal Rule of Civil Procedure 4(e)(1), service of process on an individual may be effected by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Fed. R. Civ. P. 4(e)(1). New Jersey law permits service of process on "any officer, director, trustee or managing or general agent, or any person authorized by appointment or by law to receive service of process on behalf of the corporation, or on a person at the registered office of the corporation in charge thereof." N.J. Ct. R. 4:4–4(a)(6). Moreover, "[i]f service cannot be made on any of these persons," service may be made "on a person at the principal place of business of the corporation in this State in charge thereof," and "[i]f there is no principal place of business with New Jersey," service may

be made "on any employee of the corporation within this State acting in the discharge of his or her duties . . . ." *Id.*

Here, the affidavit of service filed by Plaintiff on July 17, 2019, states that the summons and complaint were left with the wife of an owner of Five Star Services LLC. (D.E. No. 9 at 6). Plaintiff provided no additional information as to whether the wife is authorized to accept service on behalf of Five Star Services LLC, or whether the wife is an employee, trustee, agent or manager of Five Star Services LLC. (*See generally id.*). Moreover, the proof of service filed by Plaintiff does not indicate that the wife was served at Five Star Services LLC's principal place of business. Thus, Plaintiff failed to serve Five Star Services LLC under both federal and New Jersey law. Accordingly, the Court dismisses the action against Five Star Services LLC *without prejudice* for insufficient service. *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (stating that *pro se* litigants "cannot flout procedural rules—they must abide by the same rules that apply to all other litigants"); *Taveras v. Resorts Int'l Hotel, Inc.*, No. 07-4555, 2008 WL 577291, at *2 (D.N.J. Feb. 29, 2008) ("The Court is aware that Plaintiff is acting pro se; nonetheless, even a pro se plaintiff must follow the Federal Rules.").

IV. Conclusion

For the foregoing reasons, the Court grants the Defendants' motions to dismiss and denies Plaintiff's motion for default judgment.[7] The Trustee's motion for an injunction is denied. As discussed above, the Plaintiff's Complaint is dismissed *with prejudice* against Haltovsky. For the reasons stated above, all purported claims against the Trustee, Judge Defendants and Five Star Services LLC are dismissed *without prejudice*.

[7] Because the Court dismisses all claims for the reasons in this Opinion (*see* supra Part III.A–C), it need not consider additional grounds for dismissal raised by the Trustee and the Judge Defendants, such as insufficient service under Federal Rule of Civil Procedure 4(m). (*See, e.g.*, D.E. No. 11-1 at 11–13).

An appropriate Order accompanies this Opinion.

s/Esther Salas
Esther Salas, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1614

LYNN Z. SMITH,
Appellant

v.

ANDREA DOBIN, Esq.; ELI HALTOVSKY; FIVE STAR SERVICES LLC; HONORABLE ANNE E. THOMPSON; HONORABLE MICHAEL B. KAPLAN; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JOHN DOE 5; JOHN DOE 6; JOHN DOE 7; JOHN DOE 8; JOHN DOE 9; JOHN DOE 10

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-18-cv-17515)
District Judge: Honorable Esther Salas

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Date: February 25, 2022
Lmr/cc: Lynn Z. Smith
Andrea Dobin
Robert L. Gutman
Matthew Howatt

Additional material from this filing is available in the Clerk's Office.